No. 2867

IN THE

# United States Circuit Court of Appeals

## Ninth Circuit

---

WILLIAM O'BRIEN,
Plaintiff in Error,
vs.
LAS VEGAS AND TONOPAH RAILROAD COMPANY,
(a Corporation),
Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR

---

A. GRANT MILLER
Attorney for Plaintiff in Error

---

*Filed this_____day of_____, 1917.*

*FRANK D. MONCKTON, Clerk.*

Filed
FEB 28 1917

*By_____ Deputy Clerk.*

F. D. Monckton,
Clerk.

No. 2867

IN THE

# United States Circuit Court of Appeals

## Ninth Circuit

WILLIAM O'BRIEN,
Plaintiff in Error,
vs.
LAS VEGAS AND TONOPAH RAILROAD COMPANY,
(a Corporation),
Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR

### I.

### GENERAL STATEMENT OF THE CASE

This Writ of Error is prosecuted from a judgment of the United States District Court, for the District of Nevada.

It is sought to review the judgment of that Court entered pursuant to the verdict of a jury, in favor of Defendant in Error. The complaint of Plaintiff in Error alleged that he was in the employ of the Defendant in Error on the 2nd day of July, 1913, as a carpenter, on the railroad of the Defendant in Error and was instructed to work in the repairing

of a certain bridge situated about fifteen miles southeast of Bonnie Clare, in the County of Nye, State of Nevada, on the right of way of the said defendant, and by said defendant caused and permitted to travel from said Bonnie Clare to his assigned labor upon a gasoline motor section car, which said gasoline motor section car was defective in that the gasoline drain and tank valve, sometimes called the gasoline feed pipe drain-cock or pet-cock, was so worn and out of repair that it caused and permitted the gasoline from the gasoline tank of said car to escape and fall upon the heated parts or portions of the machinery of the motor of said car, which said defect was known to defendant, its officers, agents and employees, or could have been known to defendant, its officers, agents and employees by proper inspection, whereby the said gasoline became ignited and flamed up, whereupon said plaintiff threw off the spark device and endeavored to stop the said car and while the said plaintiff was in the exercise of ordinary care and without any fault on his part, he, the said plaintiff, was violently thrown from the said gasoline motor section car to the ground, through the negligence and carelessness of the said defendant, its officers, agents and employees while said car was running at the rate of about twelve miles per hour; in consequence of which plaintiff suffered the injuries complained of and asks damages in the sum of $31,134.00.

The complaint set up also that the Defendant in Error refused to come under the provisions of that

certain Act of the Legislature of the State of Nevada, known as and called "An Act relating to the compensation of injured workmen in the industries of this State and compensation to their dependents where such injuries result in death, creating an Industrial Insurance Commission, providing for the care and disbursement of funds for the compensation and care of workmen injured in the course or employment and defining and regulating the liability of employers to their employees; and repealing all acts and parts of acts in conflict with this Act." Approved March 15, 1913, and acts amendatory thereof; which was admitted by the answer of Defendant in Error.

The answer of Defendant in Error admitted the jurisdictional allegations contained in paragraphs I and II of the complaint; admits that plaintiff was in its employ as alleged in paragraph III of the complaint; admits that it was the duty of the defendant to furnish plaintiff a safe place to work and safe ways, works, machinery and appliances therefor; admits that defendant caused and permitted plaintiff to travel from Bonnie Claire to his assigned labor at said bridge upon a gasoline motor car, and denies generally the other allegations of the complaint.

After the entry of judgment Plaintiff in Error moved for a new trial, which motion was heard in the said United States District Court, and denied; said motion for new trial was upon four grounds, to-wit:

1. That errors of law occurred upon the trial of the said cause, which were excepted to by said plaintiff;

2. That said verdict was against the evidence and contrary to the evidence presented upon said trial;

3. That said verdict was contrary to law;

4. That the Court erred in instructing the jury upon the application of the Nevada Compensation Act or Workmen's Insurance Law, and that such error was the determining factor and caused the jury to return the said verdict in favor of said defendant.

Plaintiff in Error presents the question and contends that the evidence under plaintiff's complaint was complete and conclusive and entitled plaintiff to a verdict; that plaintiff's evidence was not rebutted by defendant in any material point; that the only defenses which defendant had under the law because of its rejection of the Nevada Industrial Insurance Act, was

1. That the plaintiff was intoxicated;

2. That the plaintiff willfully injured himself;

3. That the defendant was guilty of no negligence at all.

There was no evidence whatever to show that plaintiff was intoxicated.

There was no evidence whatever to show that plaintiff willfully injured himself.

There was no evidence to show that the defendant was not guilty of any negligence. And in this connection plaintiff contends that under the law the burden of proving no negligence was upon Defendant in Error, and such proof must be made affirmatively.

Plaintiff in Error also contends that the Trial Court made certain errors and particularly erred in instructing the jury as to the application of law in connection with the Nevada State Industrial Insurance Act.

Plaintiff in Error understands that the granting or denying of a motion for a new trial is in general a discretionary matter with the Court below, and that ordinarily this Court will not review such an order unless **it be manifest** that the order made in relation thereto was and is an abuse of discretion, the denial of the motion for new trial by Plaintiff in Error was and is an abuse of discretion, for the reasons hereinbefore stated, and particularly because of the error of the Trial Court in instructing the jury, and also for the reason that the evidence fully sustained plaintiff's case and there was no evidence on the part of Defendant in Error to rebut it. Further, that the Court's error in instructing the jury upon the application of the Nevada State Insurance Law was and must have been the determining factor in causing the jury to return a verdict in favor of defendant.

## TESTIMONY OF WILLIAM O'BRIEN, IN HIS OWN BEHALF

Plaintiff was called as witness in his own behalf and testified in substance that:

I was in the employ of defendant on the 2nd day of July, 1913, as a carpenter near Bonnie Clare, Nevada, got on to the gasoline motor car and started southeast to Bonnie Clare to repair a bridge, leaving Bonnie Clare at a quarter past seven in the morning. There were four Mexicans with me. After I got out about a mile and a half, I heard one of the Mexicans holler "fire" and I threw the spark that connects the wire—threw that off, and commenced to set the brake; just as I did, that Mexican he also grabbed the brake lever to help; then I bent down first on the side back of the seat I was on on the car, and I noticed the gasoline was escaping out of the cylinders; then I reached over to the opposite side, and as the flames shot and flashed up I fell off the car. The car was going east and I first looked on the left side and saw the gasoline escaping and on fire. I tried to close that cock—I could not quite reach it, the gasoline was escaping from this cock here that came from the tank, it had shaken loose. It is called a pet-cock or drain-cock. Probably about one-third or one-half of the amount of gasoline that would go through the cock was escaping. I went off the car when I straightened up; I think setting the brake helped to throw me. The car was going about twelve miles per hour; I was thrown kind of for-

ward and landed in kind of sand. I did not examine this drain-cock or pet-cock before I left Bonnie Clare that morning. I did not observe any oil escaping from the pet-cock before I left Bonnie Clare. The flame seemed to shoot up a foot or a foot and a half as I leaned over I could feel it, caught my hand and I jerked back. I was attempting to close this particular pet-cock but didn't do it, could not reach it. After I struck the ground I put my hands down and got up; I walked about a rod, and, Oh, I had such pain, I thought my back was broke in two; I probably had to walk less than a rod to the car and I threw myself over the car that way (illustrating), and told them to run me into Bonnie Clare. "7" I did not know before I was hurt that there was anything at all the matter with that section car which belonged to the Las Vegas & Tonopah Railway, and was used for taking men to and from work and so forth. Before the second of July, 1913, the road master used to come around and look at that (car) once in a while, and it was turned over to me about the tenth of June by J. J. Caughlin the road master. He said he would send me plugs and gasoline and look at the car; he said if anything went wrong with it to let him know; I had to clean the plugs and fill it with gasoline—just oil the bearings around. As I reached over and straigntened up I went off the car so quick the first thing I knew I was on the ground; I went off back; that is, I was forward, and it came kind of a whirl; I could feel myself going, and the first thing I knew I was sliding on the ground on

my back; I bent down and threw off the spark first and commenced to set the brake myself; then the Mexican sitting there in front of me grabbed the brake handle; then as soon as he grabbed the brake handle I knew that the car was going to be stopped with his handle; then I bent down to see where the fire was; and I noticed that the gasoline was escaping from the tank; that is, through that cock there; then, that is on the opposite side of the car where I was, and I would have to reach over, and I reached over, and as I reached over, the flame shot up; I straightened up from the flame, then at the same time the brake was being set all the time, and I went off there suddenly, just gave a whirl; I could feel that I gave a roll, and slid right on the ground. I worked for the L. V. & T. steady since May, 1910, until I got hurt. The platform of the gasoline section car was about a couple of inches more than seven feet in and about four feet two or three inches wide across the wood part. There is a space about a foot wide here that is flat on each side, then there is a raise in the center and comes up about sixty inches or so for to sit on. The men sit on the platform and their feet rest on this rail. The man driving the car generally sits back of the brake—that is where I sat; the brake is on the left side of the car; those cars will work either way; it was the left side the way the car was facing that morning; the brake would be at the left side, the way it was going that morning; the Mexicans were sitting around on this raised platform with me; they were sitting side-

ways; the platform on which they sat was about twenty inches wide on the top, maybe two feet; the men sit back to back facing out; driver would naturally sit kind of cornerways to look ahead; the motor is under this platform, located about a direct level with the shaft the wheels go through and about the center of the car; there are two cylinders on this particular car and each one of them is to one side of the center, one on one side of the center, one on the other with a space of about three inches between; the gasoline tank was on the back end of the car; the feed-pipe runs from the gasoline tank over to the cylinder; the gasoline tank had been filled by the Mexicans that morning, I was not with them; I had to go and fix a pump; the Mexicans put the car on the track; I didn't inspect it before I got on it; the car was not in my charge, I just had the running of it; I had nothing to do with repairing the car or anything like that; myself and the Mexicans were the only ones that used the car; it was kept in a house at Bonnie Clare; I did not examine or inspect the car at all that morning; we had travelled about a mile and a half before the Mexican hollered fire, upon a track pretty close to level, going east from Bonnie Clare. The exhaust on the car is right on the back end of the cylinder underneath the platform. The car has four wheels somewhat smaller than the ordinary handcar; the car was made by the Sheffield Car Company of Three Rivers, Michigan.

Q. (By Mr. Whittemore.) It was the standard type of gasoline section-car?

A. At that time it was; that is, the time it was made, I should have said.

When the Mexicans hollered "fire" we were running about twenty miles an hour; the first thing I did after he hollered was to throw off that spark device that stops the engine from working, and commenced to set the brake, that is, the brake lever right there. Then as soon as the Mexican grabbed the brake lever to help me stop the car I bent down to see where the fire was, see on the left side of the car, and I noticed that the gasoline was escaping; I first looked on the side I was sitting on and looked where the fire was, and where the trouble was, by looking on the left side; the trouble was on the opposite side from where I was.

Q. (By Mr. Whittemore.) How far away from you?

A. Well, of course, it is about over the width of that car, then it is an awful hard place to bend down. It was in front of me, kind of cornerways.

Q. (By Mr. Whittemore.) Isn't it true that you reached over and the flames sort of flared up, and you lost your balance, and fell off the car?

A. Well, if the brake wasn't set sudden, I don't believe I would ever have fell.

Q. You think it was the setting of the brake?

A. Yes, that threw me.

Q. That caused you to fall off?

A. Yes.

The car was running about twelve miles an hour at the time I went off, ran about two rods after I fell off. The trouble I found was that gasoline was escaping through a cock, I saw it plainly when I bent down to look; I should judge that from one-third to one-half of the gasoline that would go through that cock was escaping. I did not see the gasoline escaping looking from the right side, when I was looking from the left side under the car (31) I bent down awful quick and looked under, then straightened up and reached over and as I reached over the flame came up, I couldn't get to it, and the sudden setting of the brake and straightening up at the same time, I fell off; it threw me you understand. Stopping these cars depends a lot on the level of the track; they can be stopped in about four rods without any sudden shock, but in emergencies things are generally stopped quicker; throwing off the spark and setting the brake would cause some shock, but I only started setting the brake, then the Mexican took it, one of the Mexicans ran the car back to Bonnie Clare, and I did not know what the condition of the car was after I had fallen off . There was no more fire, one of the Mexicans told me they had closed it.

Q. (By Mr. Whittemore.) Now when you turned over to the left, and looked down under, and saw this gasoline leaking why didn't you stop the

car and get off, and turn it off instead of trying to bend over on the other side of the car?

A. The first thing that crossed my mind seeing fire I acted so quick that I just thought of an explosion the first thing; that is the natural condition any time around gasoline.

Q. Of course the natural and better way would have been to have waited until the car stopped and then turned off the gasoline, would it not?

A. I didn't know the tank wouldn't explode. A person would lots of time think of those things afterward.

Q. You signed a report of this injury and accident, did you not, shortly after it occured?

A. Doctor Clarke came to me and said he wanted an accident report the first day I was in the hospital.

Q. You remember about a report being gotten up, and you signing it?

A. Yes.

Q. You know your signature, don't you? (Hands paper to witness.)

A. Yes, that looks like my signature.

Q. The rest of it is not yours? A. No, none of it.

Q. Now these questions were read to you, and your answers were written down by Mr. Clarke, were they not, and then you signed it?

A. Yes; I don't know whether he had written them down correctly or not.

Q. Well, you read it over before you signed it?

A. No, I didn't read it over; he read it to me.

Q. He read it to you? A. Yes.

Q. And then you signed it? A. Yes; I told him I wanted to lay down in bed.

Mr. Whittemore: We offer this report in evidence, if the Court please, in connection with the cross-examination.

Mr. Miller: We object to it, if your Honor please, upon the ground that it has not been shown that the plaintiff knew the contents as they are written down; he didn't read it himself; it was read to him, or something was read to him, and he had not himself seen the writing, or read it.

Mr. Whittemore: The contents state that this document was read to him, and that the answers were read to him, and he signed it.

Mr. Miller: It is further objected to, if the Court please, that under the pleadings and the law of this State, there is no defense of assumption of risk, there is no defense of contributory negligence, and that the matters therein contained constitue no defense in the case.

Mr. Platt: Of course, if the Court please, in answer to the last objection made, we desire to state that the report itself tends to show an absence of

negligence on the part of the defendant company, which certainly is an adequate defense.

The Court: The only question I was thinking about was whether that was the exact document that was read over to him; he can look that over and see.

Mr. Whittemore: He has already testified, if the Court please, that it was, and that it was his signature.

The Court: He says the document was read over to him.

Mr. Whittemore: And then he signed it.

The Court: He didn't read it though. Just look at that Mr. O'Brien. (The paper is handed to the witness to read.)

Witness: I don't remember that it was exactly like that.

The Court: (Q). In what was it different?

A. I never remember that word "slipping" at the top, or mentioning it at all, or being read.

Q. Otherwise it is the same document that was read over to you?

A. I don't remember all the words; I was in such pain at that time that I didn't feel like being bothered.

Q. Have you anything else to say in reference to it?

A. Yes, Doctor Clarke came to me and said they had to have—

Q. No, I don't want that; just about the accuracy of the paper, as to what there is in that paper; have you anything else to say about what there is in the paper?

A. Well, I never remember the word "slipping" being in either place when it was read to me—it is in two places.

The Court: It will be admitted.

Mr. Miller: We desire to save an exception on the grounds stated in the objection.

(The paper is admitted in evidence, marked Defendant's Exhibit No. 1, read to the jury, and is as follows:

"LAS VEGAS AND TONOPAH RAILROAD COMPANY.

---

STATEMENT OF INJURED PERSON

1. State when and where you were injured.

Answer: July 2nd, 1913, near Bonnie Clare.

2. State what, in your judgment, was the cause of your injury?

Answer: Slipping and falling off of motor car.

3. In your opinion, was there any defect in Track, Cars, Engine, Tools, Machinery or other appliances or place where you were working or any carelessness on the part of the Company or anyone

in the Company's employ tending to cause the accident? If so, what or whom?

Answer: Defective cock shook loose permitting escape of gasoline, which took fire.

4. Could you by more care on your part, have prevented your injury?

Answer: Yes.

5. How long have you been in the Company's employ?

Answer: Four years.

6. State all other particulars you may know relative to the accident.

Answer: I tried to close the cock while car was in motion, slipped and fell off. Another man was applying brake at same time.

7. If married, of whom does your family consist?

Answer: Not married.

The above is a true statement, to the best of my knowledge and belief.

(Signed) WM. O'BRIEN.

Witness: H. H. Clark, Asst. Surgeon.

Date, July 3rd, 1913.

Q. (By Mr. Whittemore.) Now Mr. O'Brien, what did you mean in response to the fourth question: "Could you by more care on your part, have prevented your injury?" And you answered "Yes," what did you mean by that—in what way?

A. Well, after the accident happened; I didn't know it then—by the time I made that; I reached over to close that, I had fire in my mind; I thought afterwards, after there was no explosion, that probably if I had stopped the car it might not have happened, but I did not know it at the time I reached over; we can all see those things afterwards.

Q. Well then, it was a mistake in judgment on your part, wasn't it?

A. To a certain degree; I never expected that I would go off the car when I reached over at all.

Q. Then the whole matter of your slipping off that car was a mistake in judgment on your part, was it not?

A. I don't think so, not at the time.

Q. If you had waited until the car stopped, the accident would never have happened, would it?

A. It may not, I don't know.

Q. Do you remember making another report at this same time on another blank?

A. There was two of them there.

Q. Is that your statement there? (Hands paper to witness.) Just look that over carefully from beginning to end, and see if it is correct, and see if it is just as it was when you signed it. Do you see anything different about that than when you signed it?

A. No, it was read to me, that is all.

Q. Well, as you remember it, is it as it was read to you when you signed it?

A. Well, I don't remember the word "slipping" there.

Q. Aside from that is there anything else?

A. I never remember it being mentioned by whose directions I was sent to the hospital.

Q. Anything else otherwise than as you signed it, as you recollect signing it?

A. I don't know, really; I was in such pain.

Mr. Whittemore: We offer this in evidence, if the Court please, in connection with the cross-examination.

Mr. Miller: Objected to, if the Court please, on the ground, first, it does not specially identify the subject-matter by the plaintiff; second, in this case, under the law, there is no defense of assumption of risk or contributory negligence, and it is inadmissible to show any such defense—it has not been identified in any sufficient manner whatever.

The Court: (Q) Is this your signature?

Witness: Yes.

Mr. Miller: Your Honor will further observe that there is no evidence that the document is in the condition that it was at the time it was signed; no evidence whatever of its possession during the time, and no change has been made in it.

The Court: It is very much like a conversation: A Witness is asked if at a certain time and certain place, in the presence of certain individuals, he made a certain statement, and he replies, no, I didn't make that statement; then he is asked if he made a statement similar to that, or anything like it; and then gives the statement that he did make. Now this document is presented to him, and he has admitted that he signed it, and he has had an opportunity to show what he did say, or to show whether any of this is not what he did say; and it seems to me, after he has examined the document, and says certain things I don't remember of having said, or that he didn't say, that the document goes to the jury just as his conversation would in the case I have indicated. Of course, if you wish to have those matters pointed out more distinctly before the document is read, Mr. Miller, I think you have the right to do so.

Mr. Miller: I apprehend the witness has read it and sufficiently noted its contents, so far as that is concerned.

The Court: If there are any differences he has omitted to state, they ought to be drawn out now, before it is read; but you can follow your own course.

Mr. Miller: I shall certainly go into the circumstances under which this matter was done, in redirect; I will ask this one question, however: (Q) Mr. O'Brien, from your examination of that docu-

ment, is there any language or words contained in it, other than the word "slipping" and the name "C. E. M. Bell" as the person by whose direction you were sent to the hospital, that you don't remember being in the paper at the time you first saw it?

A. Well, it seems to me that it is kind of briefed, some of it, and when it was read over (witness examines paper); well, I don't remember exactly what was read to me at that time; I can't remember the exact words.

Q. Did you, yourself, read that document?

A. No.

Q. Who read it to you?

A. Doctor Clarke?

Q. Where? A. In the Las Vegas Hospital.

Mr. Miller: That is all for the present.

Mr. Whittemore: We will have it marked Defendant's Exhibit No. 2.

Mr. Miller: Your Honor will kindly save us an exception on the grounds stated in the objection?

The Court: You may have the exception.

(The paper is admitted in evidence, marked Defendant's Exhibit No. 2, read to the jury, and is as follows:

LAS VEGAS AND TONOPAH RAILROAD COMPANY.

REPORT OF PERSONAL INJURY TO EMPLOYERS, PASSENGERS OR OTHER PERSONS.

1. Name, residence (street and number) and

P. O. Address of person injured. Wm. O'Brien, Las Vegas.

2. Age. 42. Occupation. Carpenter.

3. A. Married or single. Single.

If married, name and residence of wife of husband.

B. If single, names and addresses of father, mother or nearest relatives. Martin O'Brien, Reedville, Wis. Brother.

4. A. Employe, passenger, traveler on highway, or trespasser? Employe.

If employe how long in service of this company, and in what capacity? Four years.

B. If passenger, where from and destination?

Ticket or pass?

C. If unknown, give full description (height, weight, hair, eyes, marks and clothing) and state what articles found on person.

5. State fully the nature and extent of injuries. Bruised back and muscular structures strained.

6. A. What was done with and for the person? Placed in hospital, Las Vegas.

By whose direction? C. E. M. Beal.

B. If not sent to hospital, why not?

C. Name and address of surgical attendant? Drs. Clark and Martin.

D. If dead, state disposition of remains. (Attach a copy of verdict of Coroner's jury, if inquest held.)

A. Date, hour (day or night), and exact point where accident occurred?

B. If at night, was it very dark? Kind of weather? Clear.

C. Did accident occur on or near a crossing? No. (State name and distance and direction from same.) Was watchman on duty?

D. Was view of trainmen or injured person obstructed? If so, by what? State fully.

E. Distance person was seen before accident?

F. Could train possibly have been stopped between time collision was imminent and time of accident?

G. On main or side track? Main track. Curve or straight line, (state whether curve to right or left.) Main track. Straight line. Up or down grade.

8. * * *

9. * * *

10. What was injured person doing at time accident occurred? Riding motor car.

11. Give full particulars of cause of accident? Loose cock jarred loose permitting the escape of gasoline which took fire. Attempted to close cock while car was in motion, slipped and fell off. Antonio Forres was setting brake at the same time.

12. A. Was person injured while making coupling or uncoupling? No.

13. * * *

14. A. Was there any defect in track, bridges, rolling stock, machinery tools, or other appliances, that caused, or may have assisted in causing the injury? If so, state fully. Loose cock permitting escaping gasoline to take fire.

B. If there was any defect, how long had same existed. I do not know.

Had same been reported? No.

C. Did injured person know of defects? No.

15. State what precautions were taken and by whom to prevent the accident? None.

16. In your opinion what further precautions could have been taken. I could have let the car burn.

21. What does injured person say as to the extent of his injuries? Back bruised and muscles injured to extent to make him helpless.

22. A. What does injured person say was cause of accident? His attempting to close this cock while car was in motion.

23. Was injured person insane, intoxicated, blind or deaf? No.

24. Was anyone at fault? If so, who? No.

25. Name, occupation, postoffice address and residence of every person who witnessed the accident, or can give any information regarding it.

(Attach hereto the written statements of such persons, signed by each.)

| Name. | Occupation. | Res. and P. O. |
|---|---|---|
| Antonio Forres | Laborer | Las Vegas |
| Jesus Caseo | Laborer | Las Vegas |
| Jose Solirio | Laborer | Las Vegas |

(Sign here) Wm. O'Brien.
(Occupation) Carpenter.
(Address) Las Vegas.

Dated July 3, 1913."

At the time I signed Defendant's Exhibit No. 1 I was in bed in the hospital, the day after I was hurt about four o'clock in the afternoon. It was presented to me by Doctor Clarke; he came to me with those papers and said he had to have those reports in order to get his pay; he read off those questions to me and I answered them; then he read them over to me and I signed them; I didn't read them myself; I had a great deal of pain that day; Defendant's Exhibit No. 2 was presented about the same time; Doctor Clarke made out the papers; he was the doctor in the hospital; the Hospital of the Las Vegas & Tonopah doctors; I didn't read it before I signed it; he read it to me; it was about seven o'clock in the morning when I was hurt; I was sitting nearly sideways, not square; the brake was in front of me; there was but one lever; the sparking device is near the brake within four or five inches maybe, the cylinders nearly directly under me; the gasoline tank is a little to one side of the car in front of the cylinder; I never set a brake upon that car before the second of July, or any similar motor section car

suddenly; I made no inspection of the car when or before I took it out; I didn't notice any grease on the parts of the car; the exhaust made considerable noise; I never remember that car back-firing; I really don't know whether I would know what it was if I heard it; I never heard of a car taking fire through back-firing; the exhaust goes outside of the cylinders; I don't think there is any muffler on it; each cylinder has one exhaust; one exhaust points to the right and one points to the left; the exhaust is nearly a foot from the wheels; this pet-cock was probably two or two and one-half feet from the exhaust, I never measured it; I didn't look to see whether there was any fire coming out of the exhaust; I know that sparks come out of the exhaust at night; you can't ten that in the day time and fire comes out of the exhaust; the gasoline was running from this what you call a pet-cock or drain-cock; when it is turned square across it is closed, and is set a little ways down under where we sit, probably four inches under, four or six; the tank is about six inches deep; the pet-cock is connected with the gasoline tank; the gasoline that leaked through the pet-cock came from the tank; the pet-cock was used to take out a little gasoline in a can sometimes or to drain the tank; when the pet-cock was closed no oil was escaping; for the proper and safe operation of the car it should be closed; the pet-cock was partly open which caused the leak of the gasoline; I didn't open it; it should not have been open.

Q. What caused it to be open, if you know?

A. Well, it wasn't a new cock, new and tight, or it would not have jarred loose like it did; the jar of the car, no doubt caused it to open on the track that it traveled.

Q. And if it had been a new cock, or in comparatively good condition, would the jarring of the car have caused it to open?

A. No.

I haven't had a great deal to do with gasoline motor engines; I never heard of a new pet-cock coming open through the jarring of the car; I rode on cars before, the same kind of cars; I would not positively state on oath a new one would not do it, because I do not know; then the pet-cock was under the gasoline tank; I ran that car about twenty-one or two days; I knew very little about the car before that; I never had any knowledge of the pet-cock being changed and could not say whether it was changed or not; I don't know how old that pet-cock was; I never heard of the pet-cock on that car coming open before; the stream of the gasoline ran slanting; the pet-cock was set down out from the bottom this way; it has to go by—if I remember right, there is a pipe that runs out; that battery box is between the tank and this end of this, if I remember right, and there is the pipe that runs out a ways from the tank, where the battery works; the pet-cock was about two and one-half feet from me, that is where I was sitting.

(A)

We will first take up the objection and exception, taken by Plaintiff in Error, to the admission of Defendant's Exhibit No. 1, entitled, Statement of Injured Person. The ground of objection was:

1. That it has not been shown the plaintiff knew the contents as they are written down.

2. He did not read it himself.

3. It was read to him or something was read to him and he himself had not seen the writing or read it.

4. That under the pleadings and the law of this State there is no defense of assumption of risk.

5. That under the pleadings and law of this State there is no defense of contributory negligence.

6. That the matters contained in the Exhibit constituted no defense in the case.

The plaintiff's testimony in regard to this document did not supply a sufficient foundation for its admission in evidence. He testified "that the signature looked like his signature; that all the rest of it was not in his writing; that he signed some paper which was read over to him; that he did not read it; I don't know whether he had written them (answers) down correctly or not; (shown the paper) I don't remember that it was exactly like that; I never remember the words 'slipping' or mentioning it at all or being read; I don't remember all the words; I was in such pain at that time that I didn't feel like being bothered."

Counsel for Defendant in Error contended that this Exhibit No. 1 was admissible as showing the absence of negligence on the part of the defendant company. It is clear from the testimony that the plaintiff did not identify the paper as the paper which he signed while in the hospital. He identified no part of it. He positively stated that some parts of it he did not remember at all and that the paper which he signed was presented to him when he was in great pain and in bed. It was not in his writing.

Documents of this kind should be carefully scrutinized and fully identified before being admitted. There was no evidence whatever presented by Defendant in Error as to identification; there was no testimony as to the possession of the paper from July, 1913, to the date of trial, and no testimony of its being in the same condition and containing the same words. Plaintiff in Error contends that the trial Court erred in admitting this document, and that the admission thereof was prejudicial to the plaintiff; that the contents tend to show contributory negligence, if anything, which is not a defense under the Nevada State Industrial Insurance Act; further that it did not show or tend to show the absence of negligence on the part of defendant, since the negligence charged in the complaint was concerning a defective or worn pet-cock.

(B)

Plaintiff in Error also objected and excepted to the admission of the paper entitled "Report of Per-

sonal Injury to Employes, Passengers or other Persons," marked Defendant's Exhibit No. "2." The grounds of objection were:

I. It does not specially identify the subject-matter by the plaintiff.

2. In this case under the law there is no defense of assumption of risk or contributory negligence, and it is not admissible to show any such defense.

3. It has not been identified in any sufficient manner whatever.

The witness did not remember the word "slipping" and testified he really did not know whether the report was correct or not; he did identify the signature; that he doesn't remember exactly what was read to him at that time; that he did not read the paper, that it was read to him by Doctor Clarke in the Las Vegas Hospital. It will be observed that there was no evidence in behalf of the Defendant in Error as to this document; there was no evidence as to the possesion of the document between July 3, 1913, and the date of trial; there is no evidence that no change had been made in it or that it was in the same condition. Plaintiff in Error contends that the trial Court erred in admitting this document, and that the admission thereof was prejudicial to the plaintiff; that the contents tend to show contributory negligence, if anything, which is not a defense under the Nevada State Industrial Insurance Act; further that it did not show or tend to show the absence of negligence on the part of

defendant, since the negligence charged in the complaint was concerning a defective or worn pet-cock.

---

## TESTIMONY OF MR. M. N. HOLLAND, WITNESS IN BEHALF OF PLAINTIFF

Mr. Miller: (Q) Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it.

Mr. Platt: We object, if the Court please, upon the ground there is nothing to show the witness knew the condition of the car at the time of the alleged accident, and the testimony tends to show that he did not see the car until ten days, about, after the accident.

Mr. Miller: If the Court please, we have already shown by the testimony that there was a defect in that car at the time of the accident; we now propose to show that that car was in the same defective condition at the time this witness received it.

The Court: Well, as Mr. Platt says, the testimony so far shows that he didn't see the car until ten days after the accident.

Mr. Miller: That is true; it is not a question of what he saw about the car at the time, but we propose to show that the same defects existed ten days afterwards.

The Court: By this witness?

Mr. Miller: Yes.

The Court: Well, can you show that the car was in the same condition ten days after the accident as it was at the time of the accident?

Mr. Miller: We can't show by this witness, or any other witness that I know of, that the car had not been handled or used during that ten days. What I propose to show is, that this same defect, shown by the testimony of Mr. O'Brien, existed ten days afterward.

The Court: It don't seem to me it is exactly right to hold the defendant liable for a defect, without showing that the defect existed at the very time of the injury.

Mr. Miller: Well, that is shown, if the Court please, by the testimony of Mr. O'Brien, and on cross-examination.

The Court: If it is shown I suppose it will be conceded. I do not think it has been shown. It seems to me the testimony only shows that the oil was oozing or running out of that stop-cock. A great many things can happen to a stop-cock in ten days, and it don't seem to me the Company should be held responsible for that unless it is shown it was in that condition at the time of the accident.

Mr. Miller: The cross-examination of plaintiff brought out there was no oil leaking from it at the time they left Bonnie Clare.

Mr. Platt: I don't desire to take issue with counsel, but the testimony shows the car was not in-

spected by plaintiff at the time he left, and didn't know its condition; that is what the testimony was.

Mr. Miller: Certainly that is it.

The Court: It might be easy to show ten or fifteen days after the accident the condition of that stop-cock was bad, and it may have been in a perfectly good condition at the time of the accident.

Mr. Miller: I have nothing more to say, your Honor, I will take a ruling.

The Court: I will have to rule against you.

Mr. Miller: Your Honor will kindly save us an exception upon the ground that the evidence is competent to show the condition of the car ten days after the accident to Mr. O'Brien, and showing that the stop-cock was defective at that time.

Q. Mr. Holland, how long did you use this particular car after it was turned over to you?

Mr. Platt: Well, if the Court please, I don't like to object to everything, but I don't know what connection will be made with this question and other subsequent questions. As to what he did with the car ten days after it was turned over to him, is certainly incompetent, irrelevant and immaterial, and has no bearing at all upon the issues involved in the case.

Mr. Miller: It is merely preliminary to another question, Mr. Platt.

The Court: I will allow one question; if the answer don't disclose it is material, it will be subject to a motion to strike. Read the question.

(The reporter reads the question.)

A. I used that car from the time it was turned over until the 15th of the following November.

Q. Did you have any trouble with that car immediately after it was turned over to you?

Mr. Platt: We object, if the Court please, upon the ground it is incompetent, irrelevant and immaterial, and if any trouble did occur with the car after it was turned over to him ten days after this alleged accident, it is too remote, and could not be binding at all upon the defendant in this particular case.

The Court: I will sustain the objection.

Mr. Miller: We desire an exception on the ground that the testimony is competent, relevant and material.

The Court: If you feel very confident of that, I will listen to any authorities you have, Mr. Miller, but I don't see how that would be proper testimony. It appears to me, even if the defendant conceded that ten days after the accident that stop-cock was in a defective condition, I don't see how that could help you, because many a piece of machinery that is in perfect condition today wears out in a very brief time, or something happens to it.

Mr. Miller: I don't wish to state the matter before the jury but I may make an offer of proof.

The Court: Very well.

Mr. Miller: Suppose it would be shown that the car caught fire again from identically the same cause, in the same manner, would not that be competent?

The Court: I don't think so at that time. It don't necessarily follow because machinery is out of fix today, that it was out of fix ten days ago. I cannot regard that as proper testimony.

Mr. Miller: Well, if the Court please, in order to save my rights in the matter, I would like to make an offer of proof. Plaintiff now offers to prove by the witness—

Mr. Platt: (Intg.) We submit, if the Court please, if there is any offer of proof to be made, that it ought to be made out of the hearing of the jury.

The Court: It is the same matter you have already suggested?

Mr. Miller: Yes. If Mr. Platt wants the jury excused, all right. I want the matter in the record properly.

Mr. Platt: If counsel says that is the extent of the offer, I have no objection to the jury remaining.

Mr. Miller: If the Court please, plaintiff offers to prove by the witness on the stand, Mr. Holland, that a few days after the car in question—

The Court: (Intg.) How many days?

Mr. Miller: About eight days, if I remember, after the car in question was turned over to the witness, that the car caught fire from the same cause.

and in the same manner as charged in the complaint on the occasion of the injury to the plaintiff.

The Court: Well, if you have any authorities on that point I would like to see them, Mr. Miller; but for the present I will sustain the objection.

Mr. Miller: Will your Honor kindly save us an exception on the ground the evidence is competent, material and relevant, and that the point of time is not too remote for the proof of the matter stated in the offer.

---

## TESTIMONY OF M. N. HOLLAND IN REBUTTAL

Q. At the time that Mr. Claiborn gave you this particular car on which Mr. O'Brien was hurt, after Mr. O'Brien's accident, was or was not the pet-cock wired?

Mr. Platt: We object, if the Court please, upon the ground that the time employed in the question is too remote, the witness having testified in direct examination that he did not receive the car from Mr. Claiborn until eight days, I think, after July 2nd, 1913.

Mr. Miller: The question is asked, if the Court please, in connection with Mr. Claiborn's denial of that fact.

The Court: Didn't you ask the question yourself?

Mr. Miller: I asked it of Mr. Claiborn, yes.

Mr. Platt: In cross-examination.

The Court: I doubt whether you can lay the foundation to get that testimony in in that way. Of course they didn't object to it at that time, and you put it in; I don't think that renders this testimony admissible.

Mr. Miller: It seems to me, if the Court please, we are entitled to it as affecting the credibility of the witness.

The Court: I don't think you can get in immaterial matters in that way; if I were to allow it in on the question of the credibility of the witness, it probably would be in for all purposes. I do not think it is admissible.

Mr. Miller: May the question stand until recess.

The Court: Yes; I am always ready to correct any error or mistake I make as long as the matter is in my hands.

Mr. Miller: This question may possibly be the same.

The Court: It is a matter of some importance to you, so you may ask it in as many forms as you wish in order to have the record as you want it.

Mr. Miller: (Q) Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt, to you, did you see any evidences of fire on it?

Mr. Platt: We object, if the Court please, on the same ground.

The Court: I will let that go with the other. Of course this testimony would be admissible if you were to prove that the car was in the same condition ten days after the accident as it was at the time of the accident; there must be proof that there was no change, that the car remained in precisely the same condition as it was at the time of the accident.

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q). "Mr. Holland, you may state the condition of this particular gasoline motor section car at the time you received it;" to which plaintiff excepted, upon the ground that it was competent to show the condition of the car when the witness Holland received it, eight or ten days after the accident.

Plaintiff was entitled to show the condition of the car within such a short time and that the same defect of the worn and defective pet-cock then existed. The time was not too remote in view of the testimony of Mr. O'Brien that the pet-cock jarred loose and that a new pet-cock or pet-cock in good condition could not have so done, and that the gasoline escaped from the tank by reason of that worn pet-cock jarring loose. We think it was entirely competent for plaintiff to show that eight or ten days later, that pet-cock was in the same condition of being worn and loose.

(D)

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q) "Did you have any trouble with that car immediately after it was turned over to you?"

Plaintiff proposed to show that that particular car caught fire again from identically the same cause a few days, about eight, after the car was turned over to the witness, and caught fire again in the same manner as charged in the complaint.

We think it was competent evidence as showing the same defect in the same pet-cock within a few days after the accident to plaintiff.

(E)

The Court erred in sustaining defendant's objection to the question propounded to the witness, M. N. Holland, in rebuttal.

(Q) "At the time that Mr. Claiborn gave you this particular car in which Mr. O'Brien was hurt after Mr. O'Brien's accident was or was not the pet-cock wired?"

It will be noted that the witness Claiborn, a witness for defendant, denied that the pet-cock was wired on cross-examination. Defendant did not object to that question put to the witness Claiborn and we think that plaintiff was entitled to have the question objected to answered as affecting the credibility of the witness Claiborn; the witness being a

disinterested person, and that the Court's ruling in this instance was prejudicial to the plaintiff.

(F)

The Court erred in sustaining defendant's objection to the question propounded to the witness Holland.

(Q) "Mr. Holland, at the time Mr. Claiborn delivered the car on which Mr. O'Brien was hurt to you, did you see any evidences of fire on it?"

This question was asked under the same views as the previous questions and in furtherance of that question, with the same ruling, objection and exception.

Inasmuch as the testimony theretofore showed that the car caught fire, we think we were entitled to show by the witness Holland, that it showed evidences of fire a few days after the accident to O'Brien.

(G)

The Court erred in refusing to give plaintiff's requested instruction No. 8, as set out in the Bill of Exceptions, on file. This instruction was stated in the exact language of the Nevada Statute. The Court substituted for it the language contained in the opening part of its instruction to the jury, as set out in the Bill of Exceptions on file, and erred in using this language referring to the latter part, being sub-paragraph 4 of the Nevada Statute:

"This presumption does not control you, except in the absence of testimony. If there were no testimony on that point, you would presume that the negligence of the company was the direct and proximate cause of the injury. But when testimony has been produced, you are to consider all the testimony; and after a comparison and consideration of all, you are to arrive at your verdict, remembering that the mere fact that a man is injured, however much his injuries may appeal to our sympathies, is not a sufficient reason why you or I, or any one else, should be compelled to pay for it. We can only be held responsible for an injury to another person, where we have by our negligence caused the injury."

Our understanding of sub-paragraph 4, is that irrespective of testimony it holds four things: 1. That the injury of the employee was caused by the negligence of the employer. 2. And was the first result of such negligence. 3. That such negligence so presumed was the proximate cause of the injury. 4. That it rested upon the employer to disprove negligence and that the presumption was a controlling presumption, unless rebutted by defendant proving affirmatively that it was not guilty of negligence; moreover that the presumption of negligence under the Statute must be considered by the jury in plaintiff's favor in considering any evidence introduced by defendant in attempting to show that it was not guilty of negligence, and that in any case the statute required that the jury should hold in

accordance therewith as to direct and proximate cause.

It seems to us that the instruction of the Court took away from plaintiff altogether the benefit of the presumption contained in the statute, and the least that can be said of the instruction is that it was misleading on these points and it is shown to have influenced the jury by the fact that the jury afterward came into Court for further instruction upon the application of this statute at 10:50 o'clock p. m., when one of the jurors said: "That was the very question that I wished to mention again. I understood it and you explained that very clearly and emphatically that all the evidence must be taken into consideration in connection with the responsibility placed upon the defendant in this case by its not complying with the provisions of the Workmen's Compensation Act;" and the Court replied: "You are, of course, to consider all the testimony and to arrive at your conclusions **from a consideration of all the testimony.**"

It is very clear that some of the jury were mislead by the Court's instruction and that the sum and substance of the Court's instruction on this point, was that the jury were to decide the case upon the testimony only, thus taking away from plaintiff the benefit of the statute as to presumption of negligence; that the defendant must rebut the presumption of negligence affirmatively and prove the absence of negligence on its part, was not conveyed to the jury by the Court's instruction.

It is the contention of Plaintiff in Error that under the Nevada State Insurance Law or Workmen's Compensation Act, there is a presumption of negligence and that it was wholly unnecessary for plaintiff to introduce any evidence whatsoever showing or tending to show negligence; that the burden rested upon the Defendant in Error to show, by competent evidence, that it was not guilty of negligence, and that the instructions given by the trial Court to the jury mislead the jury and, in effect, amounted to an instruction that the burden of proof rested upon the plaintiff to prove negligence, regardless of the presumption of negligence granted by the statute in question. We quote as follows from the instructions:

"There are three questions here which you are called upon to answer. The first is as to whether defendant was negligent in the matter of the stopcock. The next as to whether the defect in the stopcock, if it existed, was the cause of the injury; and, third, if you find that the negligence existed, and that the negligence was the cause of the injury, you are to ascertain what injury directly resulted from the fall from the car. Here the burden rests upon the plaintiff to establish his case." It will be observed that in this part of the instructions the Court ignored the matter of the presumption of negligence granted by the Statute and directed the jury that they must find that negligence existed; and in other parts of the instruction told them that they should consider all of the testimony in determining that

question, and at the place where this latter instruction was given, no reference was made to the presumption of negligence. Moreover, the instruction above quoted tells the jury that they must find that the negligence was the cause of the injury; whereas, the statute in question, in sub-paragraph 4 thereof, distinctly says that it shall be presumed that the injury was the direct and proximate cause of the negligence. The instruction above quoted throws the burden of proof upon the plaintiff in each of these particulars, which is contrary to the statute. This was manifest error and could not be otherwise than prejudicial to the plaintiff.

We quote again from the instructions as set forth in the Bill of Exceptions on file:

"The burden of proof in this case is upon the defendant to establish by a preponderance of the evidence that it was not negligent in causing the accident or the injury. In this connection, however, remember that it devolves upon the plaintiff to establish, by competent testimony, and by a preponderance of the evidence, the kind and character of negligence as charged in the complaint in this action; in other words, the proof in this regard must coincide with the allegations of the complaint, which in this case charges the defendant with negligence in supplying on the motor-car a defective or worn out stop-cock."

The above quotation from the instructions, while in the opening sentence placing the burden of proof

on the defendant to show that it was not negligent, in effect does not so do. But on the contrary, charges the jury that the burden is upon the plaintiff to establish **by competent testimony and by preponderance of the evidence,** the negligence charged in the complaint. This again ignores the presumption of negligence granted by the Statute and limits the jury in considering the question of negligence to the testimony only, without regard to the presumption granted in the Statute. In our opinion the instruction should have been that the defendant is presumed to be negligent without any testimony on the part of the plaintiff in that regard, and that unless the defendant prove, by competent testimony and by a preponderance thereof that it was innocent of negligence, then the verdict should be for plaintiff; and that the proof on the part of defendant must be affirmative in character.

We quote again from the instruction as set forth in the Bill of Exceptions on file:

"You are simply to find out in the first place, without passion or prejudice, just as you would if you were determining a matter between two neighbors, whether the defendant was guilty of negligence."

We apprehend that that was not the situation and, while the purpose of the Court was proper in endeavoring to impress the jury that they were not to be governed by the fact that the defendant was a corporation, rich or poor, and the plaintiff was a

working man; the effect was to reiterate to the jury the misleading idea that they were to determine the question of negligence without reference to the presumption of negligence.

We quote again from the instructions as set forth in the Bill of Exceptions on file:

"* * * They are to consider all the testimony that has been introduced in this case in determining whether there was negligence or not. You cannot go beyond the evidence; you cannot take the opinion of counsel, and you cannot take the opinion of the Court; you are to base your judgment purely upon the testimony in the case." Here again the Court repeatedly impresses upon the minds of the jury that they are limited to the testimony purely; that they cannot go beyond the evidence in determining the question of negligence.

We quote again from the instructions as shown by the Bill of Exceptions:

"Prior to the enactment of the Workmen's Compensation Act the burden was on the plaintiff to establish his case by a preponderance of the evidence; in other words, it was necessary that the evidence should show that the defendant was guilty of negligence which directly caused the injury. Now this has been reversed. If it appears that O'Brien was injured in the course of his employment, it is presumed that the injury was the first result of and grew out of the negligence of the railway company, and that such negligence was the direct cause of the

injury. This is not a conclusive presumption; it merely constitutes a prima facie case and it is sufficient to throw the burden of proof on the defendant to rebut the presumption of negligence. Having heard and considered all the evidence, if you find therefrom that the defendant was not guilty of negligence, it is your duty to bring in a verdict in defendant's favor, but you must find that it was not guilty of negligence, otherwise your verdict would be for the plaintiff."

The opening sentences of this instruction gives no more weight to the presumption of negligence granted by the Statute than merely to shift the burden of proof. Our view of the Statute in question, Workmen's Compensation Act, is wholly different. We contend that the presumption of negligence therein granted is conclusive upon plaintiff's case, in other words, that the jury must find for the plaintiff on that question, unless defendant affirmatively proved that it was innocent of negligence. Again this instruction limits the jury to the consideration of the testimony only, without reference to the presumption of negligence on this question. Again the Court uses this language, "If it appears that O'Brien was injured in the course of his employment," whereas, as a matter of fact, the pleading admitted it. And where the Court says that the Statute merely constitutes a prima facie case, it must have been misleading to the jury, since under the statute it constituted a complete case on this question and

could only be met by affirmative proof on the part of defendant that it was innocent of negligence.

The contention of Plaintiff in Error is that the law conclusively presumed the plaintiff's negligence without a word of testimony being introduced on the part of the plaintiff, and that the only way that defendant could then escape that conclusion was by introducing evidence to prove that it was not negligent, and that in such case its proof must be clear and strong in order to overcome the presumption of negligence declared by law. We hold that it was the purpose of the compensation act to take away not only the defenses stated in sub-paragraphs one, two and three of Section 1 thereof, but also to relieve the plaintiff from the necessity of proving negligence, and, on the other hand, placing upon the defendant the duty of disproving the negligence. Further that there was no evidence whatever introduced on the part of the defendant to disprove negligence and that consequently under said Workmen's Compensation Act, plaintiff was entitled to a verdict; that the evidence submitted by plaintiff showing the happening of the fire and the injuries sustained by him showed absolutely nothing even tending to exonerate the defendant from the presumption of negligence and that, therefore, the verdict rendered by the jury was contrary to the evidence, and that such verdict could only have been arrived at through a misunderstanding by the jury as to the application of the Workmen's Compensation Act; and that the instructions given by the Court did so

mislead the jury; and that the latter is apparent from the questions propounded by members of the jury to the Court. We contend further that the verdict rendered by the jury was contrary to law, in that under said Workmen's Compensation Act the plaintiff was entitled to a verdict by reason of the provisions of said sub-paragraph 4 of Section 1 thereof, which gave to the plaintiff the benefit of the presumption of negligence on the part of the defendant, which could only be overcome by the defendant proving its innocence of negligence, and the defendant failed so to do. That in consequence of the misleading instructions given by the Court, the jury denied plaintiff the benefit of sub-paragraph 4, Section 1, of the Workmen's Compensation Act.

It will be observed that the Court stated in the opening instruction that this case was interesting because it was the first case under the Workmen's Compensation Act where the employer had rejected the Act, and we feel that the reason why the trial Court gave instructions which mislead the jury is due partly to the fact that this was the first case, and that these features of the Act had not previously been under consideration in the Courts; and moreover there were no decisions at hand to serve as a guide. Since the trial of this cause, the case of George Hunter vs. Colfax Con. Coal Company has been reported. This case was decided by the Supreme Court of Iowa, November 24, 1915, and is found at page 1037 of the Advance Sheets of the

N. W. Reporter, published December 24, 1915, 154 N. W. Reporter, page 1037.

In this case the Constitutionality of the Iowa Workmen's Compensation Act was directly assailed upon the exact point in issue here, and the Court affirmed the validity of the Act. Sub-paragraph 4, Section 1 of the Nevada Act is the same as the Iowa Act and the Iowa Court said: "That the employee need not prove the employer was at fault, but that the latter must show that he was not," and held that the employer must show his innocence of negligence affirmatively.

The opinion of the Court in the Hunter case is quite lengthy and goes into many questions in which the constitutionality of the Act was attacked. The Court held that the only complete defenses allowed the employer under the Act were two, to-wit: Intoxication on the part of the employe; and, willfully causing his own injury. But the Court also held that the employer might show, if he could, that the injury occurred through no fault of his, and on the latter basis taken together with the denial by the trial Court of trial by jury, the case was reversed. The Court used this language at page 1065 of 154 N. W. Reporter: "And upon him (defendant) is the burden of proof to rebut this presumption, and to show affirmatively that no negligence of his is at fault for the injury." We submit that in the case at Bar defendant introduced no evidence whatever,

(a) To rebut the presumption of negligence granted plaintiff by our Statute.

(b) No negative testimony showing or tending to show that it was in no wise to blame for plaintiff's injury.

(c) No testimony showing or tending to show affirmatively that defendant was in no wise to blame or at fault for plaintiff's injury.

We submit further that there was absolutely nothing in plaintiff's evidence tending to exculpate defendant; and if, under defendant's contention it should be conceded that there was evidence in plaintiff's case tending to exculpate defendant, that such evidence was not affirmative and utterly failed to establish that it was in no wise at fault or to blame for plaintiff's injury. In the absence of ruling cases and of any precedents whatever, this being the first case arising under the Nevada Act where this question was presented, we feel that the trial Judge was considerably handicapped in dealing with the question here presented; but that, as a matter of fact and of law, plaintiff lost his case because of the errors hereinbefore complained of and particularly by reason the erroneous instructions given to the jury in regard to sub-paragraph 4, Section 1 of the Nevada State Insurance Law or Workmen's Compensation Act.

The following facts clearly and fully appeared, to-wit:

1. That the gasoline motor section car was on fire.

2. That the gasoline was running from the pet-cock.

3. That the gasoline should not have been escaping from the pet-cock.

4. That the gasoline was running from the pet-cock because the latter was worn and defective, was loose and shook loose from the motion of the car.

5. That the car was furnished plaintiff by defendant.

6. That the duty of inspection rested upon defendant.

7. That no inspection by defendant was shown.

8. That plaintiff knew nothing about the worn and defective pet-cock before he was injured.

9. That plaintiff was hurt in consequence of the foregoing facts.

10. That plaintiff suffered serious injuries.

In view of these facts, the absolute lack of evidence on the part of plaintiff tending to exculpate defendant, and the errors heretofore complained of, it is respectfully submitted that the Order of the said United States District Court, for the District of Nevada, denying the motion for a new trial should be reversed; the judgment should be reversed, and a new trial ordered.

Respectfully submitted,

A. GRANT MILLER,

Attorney for Plaintiff in Error.